MANEDAR SINGH PAKER SINGH v. ASP MAHATHIR ABDULLAH SAPAWI & ORS AND OTHER CASES

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[CRIMINAL APPLICATIONS NO: 44-52-09-2016, 44-53-09-2016, 44-54-09-2016 & 44-55-09-2016]
10 OCTOBER 2016

CRIMINAL PROCEDURE: *Habeas corpus – Application – Detention at lock-up pursuant to Magistrate's remand order – Whether Magistrate clothed with authority and competency to issue remand order – Writ of habeas corpus – Whether a proper mode of proceeding to challenge detention – Whether detention lawful – Prevention of Crime Act 1959, s. 4(1)(a) – Criminal Procedure Code, ss. 307 & 323*

CONSTITUTIONAL LAW: *Fundamental liberties – Detention – Detention at lock-up pursuant to Magistrate's remand order – Constitutionality of s. 4 of Prevention of Crime Act 1959 – Determination on legality of statute of Parliament – Whether there was pronouncement by apex court on illegality or unconstitutionality of s. 4 of Prevention of Crime Act 1959 – Federal Constitution, art. 4(3) & (4)*

The applicants were detained at a lock-up for 21 days pursuant to a remand order by a Magistrate under s. 4(1)(a) of the Prevention of Crime Act 1959 ('the POCA'). The remand order was extended to 38 days to facilitate investigation. In these applications for writ of *habeas corpus*, the applicants sought to be brought to the court and released immediately on the grounds that the detention was unlawful as s. 4 of the POCA was unconstitutional and following that, the Magistrate would not have the statutory powers to issue the said remand order against the applicants. In opposing the applications, the respondents raised a preliminary objection that the applications were not the proper mode of proceeding to challenge the detention as the appropriate mode would be to appeal or seek revision by the High Court. The respondents further argued that the Magistrate was a duly appointed judicial officer clothed with the required authority and competency to issue the remand order. Therefore, the issue of illegal detention did not and could not arise and consequently, the prerogative of *habeas corpus* could not be availed to the applicants.

Held (allowing preliminary objection; striking out applications):

(1) The order of *habeas corpus* is used to secure the release of a person who has been arrested unlawfully or without legal justification. It was incumbent upon the applicants to prove the unlawfulness or illegality of their detention. However, no facts or evidence were proffered by the applicants to illustrate the illegality of the detention under the said

remand order and how the said detention subsequently became illegal. A person detained in custody under a warrant of remand could not be said to be illegally or improperly detained. The appropriate recourse would be to appeal against such an order to the High Court or seek for its revision, as provided by ss. 307 and 323 of the Criminal Procedure Code, respectively. (paras 19 & 20)

(2) Articles 4(3) and (4) of the Federal Constitution are explicit in its contents that determination on the legality of any statute of Parliament shall reside with the Federal Court and not otherwise. There has been no pronouncement by the apex court on the legality or unconstitutionality of the POCA, in particular the impugned s. 4. In the absence of such a determination by the Federal Court, this court would exceed its legitimate jurisdiction by making any attempt to touch on such subject matter that is not within the purview of its power. Section 4 of the POCA remains valid and effectual to clothe the Magistrate with the required authority to competently issue the remand orders. As the remand order was valid, it would render the detention of the applicants lawful which, in turn, closed the door on *habeas corpus*. However, the applicants were not prejudiced from filing an application for revision. (paras 18, 20 & 22)

Case(s) referred to:

Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lui Ah Yong v. Superintendent of Prisons, Penang 1975] 1 LNS 91 HC ***(refd)***

Madjai Sanusi v. Pengarah Imigresen Negeri, Johor & Ors [1999] 7 CLJ 569 HC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Sejahratul Dursina v. Kerajaan Malaysia & Ors [2006] 1 CLJ 593 FC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 307, 323, 324, 325, 326, 327
Federal Constitution, arts. 4(3), (4), 5(1), (2), 8, 149
Prevention of Crime Act 1959, s. 4(1)(a), (2)(a)(ii)

For the applicants - Gobind Singh Deo, Prakash, Mohd Haijan Omar, Ravin & Joanne Chua; M/s Gobind Singh Deo & Co
For the respondents - Muhammad Sinti; SFC

Reported by Najib Tamby

JUDGMENT

Hayatul Akmal Abdul Aziz JC:

Introduction

[1] On 14 September 2016, the above applicants had filed a separate writ of *habeas corpus* supported by affidavits affirmed on 14 September 2016, for the applicants to be brought to court and release immediately and for any order that is deem valid and reasonable.

[2] Before the merits of the applications for the writ of *habeas corpus* by the applicants could be heard by this court, the learned Senior Federal Counsel (SFC) had raised a preliminary objection (PO) on points of law as regards to the applications *per se*. It was contended by the learned SFC that the application for *habeas corpus* adopted by the applicants was not the proper instrument or mode of proceeding to mount a challenge on their lawful detention. The learned SFC argued that the appropriate mode would be for the applicants to appeal or to seek a revision by the High Court against the remand order granted by the learned Magistrate. In this regard, I have ordered that this issue be disposed of accordingly by this court before going into the merits of the applications for the prerogative writ of *habeas corpus*. In the event the PO holds then in the circumstances, it would save a lot of time on the part of all parties by not having to go into the merits of the said applications.

[3] At the outset, it is to be noted that the applicants are represented by the same counsel before this court. With the agreement of all the parties herein, the ruling by this court on the said PO for (Case No: 44-52-09-2016) would similarly apply to the other cases as stated above [(Case No: 44-53-09-2016) and (Case No: 44-54-09-2016) and (Case No: 44-55-09-2016)]

[4] On 29 September 2016, having perused all the cause papers filed herein and after hearing the submissions from learned counsel and the learned SFC, this court allowed the SFC's preliminary objection which resulted in the striking out of all the applications before this court as stated above. The applicants, aggrieved and dissatisfied with the said decision had filed this appeal. The following are the reasons for my decision.

Salient Facts

[5] The applicants herein had been detained for 21 days from 16 August 2016 to 5 September 2016, pursuant to a remand order from a duly appointed Magistrate, pursuant to s. 4(1)(a) of the Prevention of Crime Act 1959 ('POCA'). The applicants were remanded at the lokap at Balai Polis Bercham.

[6] Subsequently on 5 September 2016, the remand order was extended under s. 4(2)(a)(ii) POCA for an additional period of 38 days to facilitate investigation under the POCA.

A **The Law**

[7] It is trite that, an application for *habeas corpus* is anchored only in regard to the issue of procedural non-compliance sufficient enough to nullify the impugned detention of an aggrieved person and to secure his freedom *via* the issuance of the prerogative writ of *habeas corpus* (see *Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 914). The duty of this court therefore, is to thoroughly inquire into the procedural steps undertaken by the respondents that had brought about the alleged detention of the applicants. The procedures are as set out under POCA and this court is required to determine that all required steps had been duly performed and the issue of procedural non-compliance or irregularities does not arise to invalidate the said detention. Fundamental liberties as encapsulated under art. 5(1) of the Federal Constitution must be safely guarded. No person shall be deprived of his life or liberty save in accordance with the law. Article 5(2) empowers the High Court to examine the detention of a subject with a view to determine the legality of his/her detention. If illegality is established, then *habeas corpus* would apply to secure the release of that aggrieved person.

[8] It is also settled that any purported irregularities during the arrest or remand proceeding are not relevant for the purpose of *habeas corpus* as the remedy in such circumstances lies in a revision or an appeal against such order (see *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613). For the purpose of a *habeas corpus* application, procedurally it is sufficient for the applicants to state that he is under a wrongful detention by the detaining authority and the burden is immediately shifted onto the respondents to satisfy the court that the impugned detention is not illegal or wrongful and the applicants are not entitled to the relief applied thereof (see *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705).

Submission By The Learned SFC

[9] It is contended by the learned SFC that the application for *habeas corpus* adopted by the applicants was not the proper instrument or mode of proceeding to mount a challenge on the lawful detention. He argued further that the appropriate mode would be for the applicants to appeal or to seek a revision by the High Court against the lawful remand order granted by the Magistrate.

[10] The learned SFC submitted that the learned Magistrate was a duly appointed judicial officer and is clothed with the required authority and competency to issue the remand order under s. 4 of POCA. That being the case, the issue of illegal detention pursuant to the respective remand order does not and cannot arise in such circumstances and consequently, it would therefore follow, that the prerogative writ of *habeas corpus* cannot be availed to the applicants.

[11] It is the contention of the learned SFC that, the applicants in such circumstances ought to have to seek a revision or appeal to the High Court against the remand order that had facilitated their detention pending the investigation by the relevant authorities.

[12] The applicants' contention on the unconstitutionality of s. 4 of POCA cannot hold in this court as that is the jurisdiction of the Federal Court as enshrined in art. 4(3) and 4(4) of the Federal Constitution.

[13] In such circumstances, the allegation on the unconstitutionality of s. 4 of POCA is unsustainable and cannot be the basis to declare the detention pursuant to the remand orders unlawful in order to invite the application of the prerogative writ of *habeas corpus*.

Submission By Learned Counsel

[14] It was argued by learned counsel that the prerogative writ of *habeas corpus* is the correct instrument to challenge the detention under POCA. Learned counsel argued that apart from seeking *habeas corpus*, the applicants in their intitule also attempted to move the court for revision under Chapter XXXI (ss. 323-327) of the Criminal Procedure Code. The applicant had taken the stand that it is up to this court to elect the mode in which to look into the detention of the applicant pursuant to the remand warrant issued by the learned Magistrate.

[15] The applicants contended that the detention was unlawful by alleging that s. 4 of POCA is unconstitutional, and consequently it would follow that the learned Magistrate would not have the statutory powers to issue the said remand order against the applicants. With the detention now being rendered unlawful, it is just that the prerogative writ of *habeas corpus* be issued to secure the release of the applicants/detainees.

[16] It is their argument that anchored on this alleged illegality, the application for the release *via habeas corpus* is most appropriate in the circumstances.

[17] It was also contended by counsel that being a "preventive detention" in nature as opposed to a "punitive detention" (pursuant to a judgment of the court after considering the merits of the case), that affects the fundamental liberty or freedom of the applicants, it was argued that the court must apply a higher and stricter standard in scrutinising the exercise of the executive powers in taking away the freedom of the applicants without a trial since the fundamental safeguards under arts. 5 and 8 of the Federal Constitution had been suspended under art. 149 thereof and it is trite law that alternative remedies cannot usurp the commanding position of the prerogative writ of *habeas corpus*.

A **Findings Of This Court**

[18] It is a given fact that the issue of fundamental liberties is enshrined in art. 5 of the Federal Constitution. No person shall be deprived of his life or liberty save in accordance with the law. Article 5(2) empowers the High Court to examine the detention of a subject with a view to determine the B legality of his/her detention. If illegality is established, then *habeas corpus* would apply to secure the release of that subject. The process to legalise detention of the subject is achieved by art. 149 that suspend issue like fundamental liberties in any statue of Parliament such as POCA in order to facilitate the implementation of the said statute. I find that hitherto, there has C been no pronouncement by the apex court (Federal Court and/or Supreme Court) on the legality or unconstitutionality of POCA in particular the impugned s. 4 by the applicants and I have not been alluded to any authority in regard to the same by learned counsel. Article 4(3) and 4(4) of the Federal Constitution is explicit in its contents, that determination on the legality of D any statute of Parliament shall reside with the Federal Court and not otherwise. In the absence of such a determination by the Federal Court, I hold that this court would exceed its legitimate jurisdiction by making any attempt to touch on such subject matter that is not within the purview of its power. This court is bound by the Federal Court decision in *State Government* E *of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975.

[19] It is trite that the order of *habeas corpus* (for review of detention) is used to secure the release of a person who has been arrested unlawfully or without legal justification. Therefore, it is incumbent upon the applicants to prove to F this court on the unlawfulness or illegality of the applicants' detention. A person detained in custody under a warrant of remand cannot be said to be illegally or improperly detained. The validity of the order of remand by the learned Magistrate should first be tested by way of an appeal or a revision (see *Madjai Sanusi v. Pengarah Imigresen Negeri, Johor & Ors* [1999] 7 CLJ 569; [2000] 5 MLJ 116). However, in the case of *Lui Ah Yong v. Superintendent* G *of Prisons, Penang* [1975] 1 LNS 91; [1977] 2 MLJ 226 it was held that a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. However, in the present case, no facts or evidence has been offered by the applicants to firstly show the alleged illegality of the detention under the said remand order save and except for H the bare allegation of unconstitutionality, and secondly, how the said detention has subsequently become illegal (if at all).

[20] It has to be said, that in the present case, we are not dealing with a preventive detention order issued under the hand of the Minister upon the I advice of the Board after considering the outcome of the investigation by the relevant authorities, but here, we are dealing with a remand order by the learned Magistrate pursuant to s. 4 of POCA. Whether s. 4 of POCA is unconstitutional or otherwise has to be determined by the Federal Court as

it is the assigned forum for it by the Federal Constitution. In the absence of such a determination, s. 4 remains valid and effectual to clothe the learned Magistrate with the required authority to competently issue the remand orders. As the remand order is valid, it would render the detention of the applicants/detainees lawful which in turn closes the door on *habeas corpus*. In such circumstances, the appropriate recourse would be to appeal (s. 307 of the CPC) against such an order to the High Court or seek for its revision (s. 323 of the CPC).

[21] The writ of *habeas corpus* is only available to a person who is being physically detained unlawfully (see the Federal Court in *Sejahratul Dursina v. Kerajaan Malaysia & Ors* [2006] 1 CLJ 593). Therefore, in the absence of illegal circumstances, I am allowing the preliminary objection by the learned SFC and further hold that the prerogative writ of *habeas corpus* cannot apply to applicants herein and is consequently dismissed.

[22] In passing, I would like to also mention that the alleged contention by the applicants that this application is a hybrid that encompasses application of *habeas corpus* and revision in one application is rejected. It is apparent that the nature of this application by the applicants is for *habeas corpus* and not a revision. But it does not in any manner prejudice the applicants from filing in an application for revision after this order.